

Employee holding gender critical beliefs suffered harassment and employer failed to take reasonable steps to prevent it (Fahmy v Arts Council England)

07/08/2023

Employment analysis: In *Fahmy v Arts Council England*, an employment tribunal considered whether an employee suffered harassment related to her gender critical beliefs and whether her employer was able to avoid liability on the basis that it had taken reasonable steps to prevent it. Amanda Steadman, principal knowledge lawyer, and Yulia Chizh, senior associate at BDBF examine the case and the key takeaways from the decision for employers.

Fahmy v Arts Council England [ET Case No 6000042/2022](#)

What happened in this case?

Ms Fahmy worked for Arts Council England (ACE). She holds gender critical beliefs, meaning she believes that sex is real, important and immutable and should not be conflated with gender identity. She does not believe that trans women are women, nor that trans men are men.

ACE created a fund to support creative and cultural activities during the Queen's Platinum Jubilee. The London Community Foundation (LCF) was responsible for awarding part of this funding to organisations in London. In April 2022, the LCF made a funding award to an organisation called the LGB Alliance to make a film. The LGB Alliance has faced accusations that it is transphobic due to the exclusion of trans issues from its campaigning remit. Following a negative reaction on social media, LCF suspended the grant.

On 14 April 2022, ACE held a 'drop in' Teams video meeting open to all staff to discuss this decision. Around 400 out of 700 staff members attended, including Ms Fahmy. The meeting was chaired by Mr Mellor, the Deputy CEO of ACE. During the meeting, Mr Mellor said that the LGB Alliance was 'a divisive organisation' with a history of trans-exclusionary activity and that his personal view was that the funding award had been a mistake.

Ms Fahmy challenged Mr Mellor, stating that it was misleading to describe the LGB Alliance as anti-trans. She also asked how gender critical views were protected within the organisation. Other employees on the call made comments criticising Ms Fahmy's position stating that it was 'extremely disappointing' to see a defence of the LGB Alliance. Another said that ACE was not obliged to protect people's views, only to protect the welfare of its employees.

After the meeting was over, Mr Mellor contacted Ms Fahmy to acknowledge that the session must have been 'uncomfortable' for her and that Fahmy might be feeling 'a little isolated and bruised'. Mellor also said these were hard issues to resolve. Fahmy replied, stating that she did not feel bruised or isolated and agreed that it was a difficult subject. Fahmy challenged Mellor's decision to voice his personal views in the Teams meeting and said this conflicted with ACE's duty to foster freedom of speech or a respectful working environment.

Later that day, Mr Mellor went on to send an all-staff email saying the 'well-being of everyone is our number one priority, and it always will be. This includes all our LGBTQIA+ colleagues. I particularly want to express my personal solidarity with our trans and non-binary colleagues'.

On 11 May 2022, another employee, known only as 'SB', sent an all-staff email encouraging staff to sign a petition created to raise a formal grievance about the Teams meeting and the colleagues who had expressed 'clear, homophobic, anti-trans views'. It was open to staff to add comments and several posted comments which referred to gender-critical beliefs as a 'cancer' and equated such views to racism or sexism. Another comment described the LGB Alliance as 'a glorified hate group' supported by 'neo-Nazis, homophobes and Islamophobes'.

The next day, Ms Mitchell, Ms Fahmy's line manager, emailed Mr Henley, the CEO of ACE, raising concerns about the petition and the associated comments. She said that it encouraged 'poor and unprofessional behaviour from staff', that some of the comments could be seen as 'inciting hate' and that some were clearly directed at Ms Fahmy. She asked that consideration be given to the distress caused to Ms Fahmy and other members of staff. The petition was eventually removed after it had been up for around 26 hours.

In September 2022, Ms Fahmy brought a claim alleging harassment related to her gender critical beliefs. She also brought a claim of victimisation. This analysis discusses the harassment claim only.

What was decided?

It was not in dispute that Ms Fahmy's gender critical beliefs were protected under the [Equality Act 2010 \(EqA 2010\)](#) following the Employment Appeal Tribunal decision in *Forstater v CGD Europe* [UKEAT/0105/20/JOJ](#). Therefore, the issue the tribunal had to determine was whether she had been harassed on the grounds of those beliefs during the Teams meeting and as a result of the petition.

As to the Teams meeting, the tribunal said that it had been unwise for Mr Mellor to express personal views which had aligned him with one side of the debate. Indeed, the tribunal remarked that his actions in this respect had 'opened the door' for the subsequent petition and comments. Yet, the tribunal concluded that his comments at the Teams meeting did not amount to harassment. Nor did the tribunal believe that the comments expressed by other colleagues during the Teams meeting amounted to harassment. Ms Fahmy had chosen to engage in what was a robust debate on a controversial topic. Although she was angry and upset, it had not come as a shock to her, and she had said herself that she did not feel bruised or isolated.

However, the harassment claim was upheld in relation to SB's email about the petition and the comments arising from this made by other members of staff. Ms Fahmy had been left feeling 'deeply upset'. ACE sought to avoid liability for this harassment on the basis that it had taken all reasonable steps to prevent it from occurring. In particular, it had suspended SB, had taken disciplinary action against two employees who had posted comments, and it had a Dignity at Work policy in place. However, the defence failed because:

- the Dignity at Work policy had not been reviewed since 2019
- the Dignity at Work policy did not accurately set out the characteristics protected under [EqA 2010](#). It referred to 'gender' (which is not a protected characteristic) and omitted both 'sex' and 'belief' (which are protected characteristics), and
- ACE knew that it needed to update its equality training to include belief discrimination, but it had failed to do so on the basis that it had not found a suitable trainer to deliver the training

What are the learning points for employers?

It is clear that this is a debate which provokes strong feelings. Employers must equip themselves to navigate this potential clash of rights.

On the one hand, gender critical beliefs are protected beliefs and workers should not be discriminated against or harassed for holding or expressing such beliefs. On the other hand, trans workers who have undergone gender reassignment are protected from discrimination and harassment. Further, trans workers who have not undergone gender reassignment, and workers who are not trans themselves may find the expression of gender critical views to be offensive and also complain of harassment.

In either case, employers can be vicariously liable for acts of discrimination or harassment committed by their workers. What practical steps can be taken to manage this risk?:

- ensure that Dignity at Work policies (and related policies) are up to date. Ideally, such policies should be reviewed on an annual basis
- ensure that the terminology used in such policies reflects [EqA 2010](#) (eg 'sex' rather than 'gender') and that it covers all protected characteristics. Underline that those holding gender critical beliefs and trans workers are protected from discrimination

- set out the standards of behaviour expected from staff, including the need to treat colleagues with dignity and respect, both in person and in virtual meetings and also in electronic communications. Explain that disciplinary action will follow where staff fail to meet such standards, up to and including dismissal
- advise those in managerial positions to take care when and how they express their personal opinions on the debate. As happened in this case, doing so may embolden employees on one side of the debate to become more antagonistic towards those on the other side, in turn, risking harassment claims
- ensure that such policies are actually communicated and read by staff. Consider asking staff to provide a written acknowledgement that they have read and understood them
- deliver equality training to staff, ensuring that it is balanced, thoughtful and clearly presented and also refreshed at regular intervals. Failure to do this may mean that you cannot rely on a defence that you have taken all reasonable steps to prevent discrimination. Ensure that the training covers belief discrimination alongside other types of discrimination. This is an area which is often overlooked in the training scope
- respond quickly and effectively to complaints of discrimination or harassment
- continue to monitor this fast-moving area of law. The tribunal's decision in another gender critical belief case—*Meade v (1) Westminster City Council and (2) Social Work England* is expected later this year

This article has been republished with the kind permission of the authors. The original article can be found on the BDBF website [here](#).